Supreme Court, U.S.
FILED
JUL 26 1995
OFFICE OF THE CLERK

(2)

No. 95-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NTDEC, NINTENDO ELECTRONIC CO., LTD., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC.,

Petitioners,

-against-

NINTENDO OF AMERICA, INC.,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas G. Gallatin, Jr.
Mudge Rose Guthrie Alexander
& Ferdon LLP
180 Maiden Lane
New York, New York 10038
(212) 510-7000

Counsel for Respondent
Nintendo of America, Inc.

Balmar Legal Publishing Services, Washington, DC., (202) 682-9800

BEST AVAILABLE COPY

11pp

QUESTION PRESENTED

Petitioners are engaged in a major worldwide counterfeiting operation which profits from the illegal pirating of Nintendo's copyrights and trademarks. They willfully ignored this litigation in the district court after receiving actual notice and service of process, and fled to Taiwan after removing all of their assets from the jurisdiction. A default judgment was entered on an extensive factual record and after repeated notices to petitioners. The judgment remains unsecured and unsatisfied.

Is there any ground upon which this Court should grant a writ of certiorari to petitioners to review their willful default when there was substantial support for the findings of fact and conclusions of law of the courts below, and the issues raised present no unresolved federal question requiring review by this Court and no point of law upon which lower courts are in conflict?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
REASONS TO DENY THE WRIT	5
CONCLUSION	7

TABLE OF AUTHORITIES

STATUTE	Page
Lanham Act, 15 U.S.C. § 1117(a)	6

Respondent, Nintendo of America Inc. ("Nintendo"),[1] submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit of Petitioners NTDEC, Nintendo Electronic Company, Ltd., Jimmy Yao, Wang Wen-Fu, Wang Su-Tang, Chen Mei-Lin, and Mega Soft, Inc. (collectively "petitioners").

STATEMENT OF THE CASE

Petitioners' statement of the case repeatedly misstates the record evidence on which the default judgments were entered against them below. The opinions of the district court and the Court of Appeals for the Ninth Circuit fairly recount that evidence. The following is a brief summary.

Petitioners are in the business of illegally reproducing and repackaging Nintendo's copyrighted video games in Taiwan for sale in the United States and other countries. PA. 3.[2] On June 4, 1991, United States Customs agents arrested petitioners Jimmy Yao and Wang Wen-Fu in Chicago on criminal charges of trafficking in counterfeit Nintendo video game cartridges. *Id.* With the advice of petitioners' criminal attorney, NTDEC pled guilty to a felony violation of trafficking in counterfeit goods in exchange for the government's agreement to drop all other criminal charges. *Id.*

In May 1991, Nintendo commenced this civil action against petitioners alleging copyright infringement, trademark

---

[1] Pursuant to Rule 29.1 of this Court's rules, respondent states that Nintendo of America, Inc. is a wholly–owned subsidiary of Nintendo Company, Ltd., a Japanese corporation whose shares are traded on the Osaka and Tokyo stock exchanges.

[2] As cited herein, references to the Supplemental Excerpts of Record submitted by Respondent to the Ninth Circuit are designated "Supp. Rec."; references to Petitioners' Appendix are designated "PA.;" references to the civil docket sheet are designated "CR.;" references to the Excerpts of Record submitted by Petitioners to the Ninth Circuit are designated by "App. Rec."

infringement and unfair competition. *Id.* At the same time, Nintendo filed a motion for a temporary restraining order to freeze the petitioners' United States assets. The motion was granted. CR. 23. The summons and complaint and the restraining order were personally served upon petitioners Jimmy Yao and Wang Wen-Fu on the day of their arrest in Chicago. PA. 3. Petitioners' civil attorney, Edmund Nomura, acknowledged service on behalf of all petitioners and filed an answer on behalf of all petitioners on July 2, 1991. *Id.* On August 14, 1991, Burton M. Bentley, Esq. was substituted in place of Nomura as attorney of record for petitioners Nintendo Electronic Co., Inc., Jimmy Yao, Wang Wen-Fu and Mega Soft Inc. *Id.* Nomura continued to represent petitioners NTDEC, Chen Mei-Lin and Wang Su-Tang. *Id.*

Throughout the proceedings in the district court, petitioners repeatedly frustrated Nintendo's efforts to obtain discovery. PA. 4. Only two of the petitioners responded to Nintendo's first document request, and their answers were evasive and inadequate. On the day that Wang Wen-Fu's deposition was scheduled, petitioners' counsel requested, as a condition to proceeding with the deposition, access to the proceeds in a bank account which was frozen pursuant to the temporary restraining order. Nintendo agreed. CR. 41. Having gained possession of these assets, Wang Wen-Fu then refused to provide any substantive answers to counsel's questions, despite the fact that the criminal action against him had been concluded with a plea.

Thereafter, petitioners refused to participate in any further discovery. PA. 4. Nintendo filed motions to compel discovery which the district court granted. *Id.* The district court explicitly cautioned that the entry of a default judgment could result from failure to comply with its discovery orders. The moving papers and the district court's orders were duly served on petitioners. *Id.*

Bentley abruptly moved to withdraw as counsel on June 22, 1992. *Id.* His motion included signed authorizations by each of his clients (except Jimmy Yao) to serve all pleadings, motions and other documents to them "addressed to Defendants, and each of them c/o Henry Wong." *Id.* Bentley's motion to withdraw was mailed to petitioners in care of Wong. PA. 4. The district court granted Bentley's motion to withdraw on September 11, 1992. *Id.* The order directed that all pleadings, motions and other court documents intended for Bentley's clients be "served on said Defendants, in care of Henry Wong" at the address furnished by petitioners and that service upon Wong in this manner shall constitute service upon petitioners. *Id.* The Court further ordered that petitioners obtain written authorization of the court prior to any change of address by Mr. Wong and warned that failure to do so could result in a default judgment against them. PA. 38-39.

On September 4, 1992, Nomura had also moved to withdraw as counsel on the basis that his clients failed to respond to any of his letters or otherwise provide any instructions. PA. 4. On October 2, 1992, the district court granted Nomura's motion to withdraw, ordering that service on Nomura's clients be made to NTDEC Electronics Co., Ltd., 6F No. 22, Sec. 2 Keelung Rd., Taipei, Taiwan, R.O.C. *Id.* Nomura furnished this address and warranted that it was the most current address for all of his clients. *Id.* The district court's order also instructed each of Nomura's clients to provide the court with a current address and phone number and to inform the court of any changes. *Id.* None was ever provided. *Id.*

Prior to Nomura's withdrawal, on September 15, 1992, the district court granted Nintendo's motion for entry of default judgment against NTDEC, Wang Su-Tang, and Chen Mei-Lin for failure to comply with the discovery orders. PA. 5. Plaintiff subsequently moved for entry of default judgment against each of the remaining defendants which the district court granted. *Id.*

The district court issued a notice of hearing for proving up damages against petitioners scheduled for March 30, 1993. *Id.* Petitioners did not appear at the hearing. *Id.* Following a full hearing which included the courtroom testimony of five witnesses, the presentation of 95 exhibits and extensive written testimony, the district court entered a default judgment and assessed damages on May 17, 1993, in the amount of $24,059,062 against all defendants on the basis of substantial findings of fact and conclusions of law. App. Rec. 37.

On June 17, 1993, petitioners reappeared through new counsel and filed a motion to set aside the default judgment arguing for the first time alleged deficiencies in service and excessiveness of damages. PA. 35-36. In addition, defendants alleged, as a purported excuse for their failure to participate in the proceedings, that they had been advised by counsel that a default judgment would be unenforceable against them in Taiwan. PA. 36. The district court denied the motion in an 11-page Memorandum and Order dated August 20, 1993. PA. 34-44. Petitioners filed an appeal with the Court of Appeals for the Ninth Circuit. PA. 1. The Court of Appeals affirmed. PA. 2. Petitioners now petition this Court for a Writ of Certiorari. No bond has ever been posted to secure the judgment, and the judgment remains unsatisfied.

SUMMARY OF ARGUMENT

Petitioners are notorious counterfeiters who made a conscious choice to ignore civil litigation in the courts of this country. A default judgment was entered in this case on an overwhelming factual record establishing the petitioners' willful flouting of the process of the federal courts. On this factual record, no issue of due process arises, no important federal issue is presented, and no inconsistency in the application of federal law is even alleged. There is no basis upon which a writ of certiorari should be granted.

REASONS TO DENY THE WRIT

Petitioners do not present, nor does there exist, any ground upon which a writ of certiorari should be granted in this case. They have no answer to the fact that they, with proper notice, purposefully chose to ignore the proceedings in the lower court. Indeed, petitioners concede that their disregard for the district court proceedings was simply the result of their confidence that their sizable Taiwanese assets could not be reached by any judgment entered by that court, whatever the judgment's size and however fairly it was determined.

Petitioners' appeal presents a unique set of facts applicable only to petitioners. There is no question that petitioners received actual notice of the litigation and were given every opportunity to participate therein. Petitioners concede that they received service of the summons and complaint and actually appeared to enter an answer. Further, in March, 1992, petitioners responded to document requests and, on April 21, 1992, made misrepresentations to the district court and respondent regarding their intention to cooperate in the discovery process. Their actual participation in the litigation did not end until all of petitioners' assets were released, at which point petitioners fled the country.

Apart from the failure to point to any issue worthy of review by this Court, the issues petitioners wish to reargue before this Court are wholly without merit on the factual record presented. Petitioners' arguments were fully considered and properly rejected by the district court and the Court of Appeals for the Ninth Circuit.

Following petitioners' flight from the jurisdiction, all necessary pleadings were properly served upon petitioners at their last known address in Taiwan or pursuant to their own instructions — *i.e.* by service upon their authorized agent, Mr. Henry Wong. The district court's factual findings that there was no defect in service is fully supported by the facts of this case and should not be revisited by this Court. In affirming the district

court's judgment, the Court of Appeals was correct that petitioners' "failure to show up at the hearings to argue on their own behalf cannot be attributed to any fault of [respondent] or the court." PA. 9. The routine entry of a default judgment on the record presented, albeit in a large amount, presents no "special or important" legal issue for this Court's review.

Petitioners' challenge to the district court's calculations of petitioners' profits under the Lanham Act is equally without merit and unworthy of this Court's review. Petitioners' reliance on the Lanham Act's use of the word "profits" as a basis for appeal disregards the plain language of the statute: "In assessing profits the plaintiff shall be required to prove defendant's sales only; *defendant must prove all elements of cost or deduction claimed.*" Lanham Act, 15 U.S.C. § 1117(a) (emphasis added). If there is any discrepancy between the amount of the default judgment and the amount of petitioners' profits, the burden was on defendant to prove that discrepancy in the district court.

In light of the criminal counterfeiting conviction based on the same facts out of which this civil suit grew, petitioners had ample notice that a large judgment in respondent's favor would likely be reached. However, they purposely avoided participation in the litigation, content in their belief that no district court judgment could be enforced against their assets in Taiwan. There is conclusive factual support for the district court's finding that it was petitioners' own decision not to have greater participation in the lower court proceedings. Petitioners' bad faith failure to appear and offer the required proof in the court below forecloses them from attempting to offer that proof now.

Clearly, this is a situation in which petitioners made a choice to ignore litigation of which they were amply aware and now, in hindsight, wish to undo that which they themselves have done. They wish to avail themselves of the privileges of the United States courts, now including this Court, without subjecting themselves to the authority of those courts. The judgment

below was duly entered against petitioners on a conclusive factual record. Petitioners have not presented any ground upon which this Court should issue a writ of certiorari.

CONCLUSION

For each of the reasons set forth herein, the Petition should be denied.

DATED: July 26, 1995

Respectfully submitted,

Thomas G. Gallatin, Jr.*
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON LLP
180 Maiden Lane
New York, N.Y. 10038

Counsel for Respondent
Nintendo of America, Inc.

*Counsel of Record